

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

YAGOUR M. MOHAMED,)
Plaintiff,)
vs.) CRIMINAL CASE NO.
) CCB-21-01283
BANK OF AMERICA, N.A.,)
Defendant.)
_____)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CATHERINE C. BLAKE
UNITED STATES DISTRICT JUDGE
THURSDAY, JUNE 9, 2022
BALTIMORE, MARYLAND

For the Plaintiff:

Robert Murphy, Esq.

Tara Keller, Esq.

For the Defendant:

Thomas Hefferon, Esq.

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Reported by:

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1 P R O C E E D I N G S .

2 (2:21 p.m.)

3 **THE COURT:** Good afternoon. You can all be seated.
4 Do you want to call the case?

5 **THE CLERK:** The matter pending before in court is
6 Civil Number CCB-21-01283, Mohamed vs. Bank of America, N.A.

7 The matter now comes before this Court for the purpose of
8 a motions hearing.

9 Counsel for the record starting with the Plaintiff.

10 **MR. MURPHY:** Good afternoon, Your Honor. Attorney
11 Robert Murphy on behalf of the Plaintiff.

12 **MS. KELLER:** Tara Keller on behalf of the Plaintiff.

13 **MR. HEFFERON:** Your Honor, Thomas Hefferon on behalf
14 of the Defendant.

15 **MS. McCORKLE:** Your Honor, Virginia Selden McCorkle
16 on behalf of the Defendant.

17 **THE COURT:** Okay. All right. And let me just
18 indicate our current COVID protocol. If you are fully
19 vaccinated and you are speaking and you would like to remove
20 your mask, you may, which I'm about to do.

21 You don't have to if you are not fully vaccinated or not
22 speaking. While you're not speaking, please leave your mask
23 on. And thank you all for being here. I do appreciate, sort
24 of, in-person chance to talk to you all about the issues. I
25 am -- I regret, I gather, Mr. Murphy had some difficulties.

1 **MR. MURPHY:** Your Honor, it's fine. I actually got
2 here with two minutes to spare.

3 **THE COURT:** Well, I hope you were not breaking any
4 speed laws.

5 **MR. MURPHY:** I wasn't. It's hard to do that around
6 D.C.

7 **THE COURT:** Yeah. Yeah. Well, anyway, thank you
8 all for being here. There are a number of issues. I'll have
9 some questions as we go along, but I thought it also would be
10 -- I would benefit from a chance from hearing you present your
11 cases.

12 Obviously, I'll start on the defense side. Let me
13 preliminarily just ask a question, obviously, one of the
14 things that I've been provided at some point, some rulings in
15 the Yick case in California, and I believe there is an -- I
16 gather an MDL pending. And I'm curious as to what's going on
17 with any California cases. Are the issues similar, identical?
18 Well, obviously, California law might be different from
19 Maryland, but just what's the status of that case as a
20 preliminary matter if you want to tell me your information,
21 Mr. Hefferon?

22 **MR. HEFFERON:** Of course, Your Honor. Thomas
23 Hefferon for the Defendant. The California case when -- first
24 started with Yick being a case up in the Northern District.
25 The preliminary injunction that was issued was before the

1 matter then became an MDL. I think if memory serves it was a
2 pending petition, but in any event the case has now been MDL'd
3 and it's down in the Southern District down in front of Judge
4 Burns.

5 **THE COURT:** Right.

6 **MR. HEFFERON:** And the parties have briefed a motion
7 to dismiss and we had argument that was then cancelled at the
8 last minute and it hasn't been reset. So that's where we are.

9 **THE COURT:** Okay. I was wondering. I saw that it
10 hadn't been ruled on. Of course, I hadn't ruled on mine
11 either, but it's just pending. There is nothing, sort of,
12 else going on at the moment.

13 **MR. HEFFERON:** That's correct, Your Honor. And it's
14 California only.

15 **THE COURT:** Okay.

16 **MR. HEFFERON:** And my client was the prepaid debit
17 provider for 12 states. And so that is -- there are a number
18 of constituent cases that are -- and their individual cases
19 that have continued to be added, again, in the MDL in
20 California.

21 **THE COURT:** But they're all California. It's an MDL
22 but it's all California MDL.

23 **MR. HEFFERON:** That's correct. That's correct.
24 There are some cases pending like this one in some different
25 jurisdictions, but there is only the single MDL that's

1 California.

2 **THE COURT:** And do you know -- and we'll hear more
3 about this in this case, whether those are just the pandemic
4 relief unemployment or are they general unemployment insurance
5 benefits.

6 **MR. HEFFERON:** That's all forms of unemployment.

7 **THE COURT:** All forms.

8 **MR. HEFFERON:** Yes, Your Honor. And also includes
9 disability benefits, which in California, and it was -- each
10 state is different, in California disability benefits were
11 loaded on the same cards as unemployment.

12 **THE COURT:** I see. Okay. All right. Thank you.

13 Before I hear further from you, let me just see if there
14 is anything that Plaintiff's counsel would -- do you have any
15 additional information?

16 **MR. MURPHY:** No, Your Honor. The review of the
17 docket this morning confirmed what counsel said. It was taken
18 off the oral argument calendar in January and it's been
19 sitting there gathering dust, weeds. And I think the only
20 other thing was that they did go to mediation, that's correct.
21 We did mediate it.

22 **THE COURT:** That was at the preliminary injunction
23 stage, right?

24 **MR. HEFFERON:** No, Your Honor. Actually, in the
25 Southern District of California, they have an early mutual

1 evaluation process.

2 **THE COURT:** I see.

3 **MR. HEFFERON:** So we had a discussion pursuant to
4 that process. You have it with the magistrate with no
5 involvement of the district judge.

6 **THE COURT:** Okay. All right.

7 Well, thank you all. Then I'll go ahead and start. We
8 have our case here, our Maryland case and I'll be happy to
9 hear from you on your motion to dismiss.

10 **MR. HEFFERON:** Yes, Your Honor. I thought it might
11 be helpful just to give a little context to make sure that --
12 to avoid any confusion.

13 **THE COURT:** Sure.

14 **MR. HEFFERON:** But just about how the program
15 worked. And at some levels some of these details don't matter
16 legally, but I think it's a little helpful to put in some
17 context, and to the extent they are, they are based on what
18 was alleged.

19 **THE COURT:** And I'm just going to ask you to keep
20 your voice up. The end of the sentence is --

21 **MR. HEFFERON:** That's usually not a problem for me.

22 **THE COURT:** Oh, that's better. Okay. Thank you.

23 **MR. HEFFERON:** So I'll have no trouble complying
24 with that request, Your Honor.

25 **THE COURT:** All right. Thank you.

1 **MR. HEFFERON:** So the Maryland Department of Labor,
2 Division of Unemployment Insurance obviously assesses citizens
3 for unemployment insurance. And at this time, at the time
4 these events occurred, it had two methods to distribute those
5 benefits. One was through paper check, and the other one was
6 to load the money on a Bank of America debit card.

7 The debit card was what Mr. Mohamed chose and when one
8 chose the debit card, then Bank of America would mail the
9 debit card to that individual. Prior to the choice by the
10 individual recipient, the bank would have no contact with the
11 recipient, that was all done through the DUI. DUI arranged
12 for the benefits and said, how would you like to get it?
13 Would you like to get a check, or would you like to get a
14 debit card, and Mr. Mohamed selected a debit card and those
15 who did then the bank would mail a package with the card to
16 the recipient.

17 **THE COURT:** So DUI had the initial communication
18 with Mr. Mohamed, do you want a check or do you want a debit
19 card?

20 **MR. HEFFERON:** That's correct.

21 **THE COURT:** And if the answer came back debit card,
22 it gets referred to the bank.

23 **MR. HEFFERON:** Yeah, actually, the way it works is
24 the DUI just provides a data file over to Bank of America, and
25 said, here's today's list of people who have selected a debit

1 card who don't already have an account, therefore, don't
2 already have a card.

3 As sometimes you already have a card, Mr. Mohamed is an
4 example, sometimes during this period you're unemployed and
5 then you get a new job and then you lose the job again. So
6 only for people who have not received unemployment if they
7 select a debit card, then they're mailed a debit card by Bank
8 of America.

9 The debit card comes with an account agreement just
10 like, you know, all of us have account agreements with our
11 credit card companies or debit card companies, so the debit
12 card comes along with the account agreement. The account
13 agreement is attached to the complaint, that's the correct
14 version of the account agreement.

15 **THE COURT:** Okay.

16 **MR. HEFFERON:** And that governs the terms and
17 conditions under which the bank and the debit cardholder have
18 their contractual relation.

19 Separately, of course, as you would expect, Bank of
20 America has a contract with DUI, with the State of Maryland
21 for the -- you know, providing debit cards to people who are
22 referred to it by DUI. The form of contract is attached to
23 the complaint, but it's blank and unsigned, but it does
24 reflect on the front that the contract actually isn't just
25 that document, it includes the RFP and the RFP response which,

1 Your Honor -- I mean, that's not an uncommon way that
2 government contracts are done, so that the government doesn't
3 spend a lot of time rewriting all of the terms in order to get
4 the contract, they'll attach the RFP and the RFP response.

5 And so that contract is separate from -- it's between the
6 bank and the state, and it's separate from the contract, the
7 account agreement between the bank and the debit cardholder.

8 **THE COURT:** Now, the RFP here was initially entered
9 into in 2013?

10 **MR. HEFFERON:** Yes, Your Honor.

11 **THE COURT:** And has it changed? Does it get
12 updated? Does it get -- what happens to it?

13 **MR. HEFFERON:** The original term of the contract, I
14 believe was until 2017, and it was subject to two two-year
15 renewals, which were exercised, and the contract has now
16 concluded.

17 The last that -- Maryland has now gone to provide an
18 option for paper checks or direct deposit. No more debit
19 cards.

20 **THE COURT:** Yeah, and I think that might not have
21 actually happened as of the time of the briefing, but that's
22 done now?

23 **MR. HEFFERON:** It's done, yes, Your Honor. I
24 checked the website yesterday just to confirm, but I also had
25 talked to my client. And the last loading of the debit card

1 was May of 2021, and the debit cards themselves were
2 deactivated in February of this year.

3 **THE COURT:** Okay. And going back to the two-year
4 renewals, I mean, I guess one of the things that you've raised
5 is that the contract between the bank and the state did not
6 require the chip technology?

7 In the course of the renewals, in the course of the state
8 looking at this contract that had been formed by accepting the
9 RFP, I guess, were there any changes that you can think of
10 that are significant to this, or is it simply the same
11 identical contract that was renewed every couple of years?

12 **MR. HEFFERON:** Your Honor, I --

13 **THE COURT:** If you know.

14 **MR. HEFFERON:** Yeah, I don't have complete knowledge
15 of that, but I do know that when the extensions were put in
16 place, they are a single amendment that just says, the parties
17 hereby agree to go forward with the extension.

18 **THE COURT:** Okay.

19 **MR. HEFFERON:** And, of course, the existing
20 agreement that is in effect, you know, at the time of the
21 events in question would be, you know, the original form that
22 was attached to the complaint, the RFP, the RFP responses and
23 the amendments.

24 **THE COURT:** Okay.

25 **MR. HEFFERON:** So --

1 **THE COURT:** Which are the exercise of the renewals?

2 **MR. HEFFERON:** Yes, plus whatever, if there were
3 other amendments, I'm not aware of any, but...

4 **THE COURT:** Okay. All right.

5 Probably therefore not relevant at all but just a
6 question.

7 **MR. HEFFERON:** Yeah, and I was trying to give
8 context. I was -- recognized -- I know when I got involved in
9 this in similar matters, it was a learning curve about how the
10 process works like most things as Your Honor deals with in
11 cases, it's helpful to understand the background.

12 Two other items of context. One is the account
13 agreement contains several terms that relate, as they're
14 discussed in the brief, relate to the possibility that someone
15 who has been issued a debit card will experience an
16 unauthorized transaction. Similar to the kind of protection
17 that, again, probably we all have on our credit cards or debit
18 card.

19 This particular debit card, the bank agreed to a zero
20 liability policy, which meant that if a cardholder experienced
21 an unauthorized transaction, that the bank would make the
22 cardholder whole, which is actually better than federal law if
23 it applied, which has the \$50 liability limit.

24 The bank zero liability policy actually makes the person
25 whole, but it does limit consequential damages. The second

1 item of context is, there is discussion, obviously, in the
2 briefs and the complaint about Regulation E.

3 Regulation E is the general provision of federal law.
4 It is the regulation that enacts the Electronic Funds Transfer
5 Act, and administered at this point by the Consumer Financial
6 Protection Bureau. And it provides the rules of the road for
7 Electronic Funds Transfers. And now since amendments added
8 this several years ago, prepaid cards.

9 And so it provides, among other things, certain rules
10 about how you make a claim about an unauthorized transaction,
11 so there is a parallel there between the contract and the
12 Regulation E, in any event.

13 So those are the other two items of context if Your Honor
14 doesn't have any other questions or background.

15 **THE COURT:** No, that's fine.

16 **MR. HEFFERON:** Your Honor, our perspective as
17 reflected in the briefs is that, you know, the main claim in
18 this case is the claim that Mr. Mohamed made in Count 4 that
19 there was a breach of the account agreement. That he had a
20 debit card, that there were 14-plus thousand dollars worth of
21 unauthorized transactions, that he had asked the bank to
22 reimburse those transactions, and the bank had not done so and
23 so he brought the lawsuit included among the claims, a claim
24 that he should have been paid that \$14,000.

25 As we show in our briefs, and we do include a

1 declaration which is uncontested, after the lawsuit was filed,
2 the -- Mr. Mohamed was made good on that amount, the 14,500,
3 whatever the number was. And so we argue that his contract
4 claim, his contracts count for breach of the account agreement
5 is moot. And so there -- that's really the -- it's not the
6 only piece of the contract claim admittedly, but that's what
7 we saw as a central issue in the case.

8 Now, the Plaintiffs do express a worry at the time that,
9 perhaps, well, perhaps something else would happen that was
10 bad or there was a threat of recurrence. And whatever the
11 legitimacy of that, I'm not going to contest the legitimacy of
12 it, nothing else did happen and the cards are now deactivated.
13 And so that is not a basis for avoiding the mootness.

14 There is another related claim in contract, which was
15 the contention that, well, the bank also breached the contract
16 because it froze his cards. Under the account agreement, the
17 bank has the contractual right to freeze a card if it
18 suspects, you know, not to say the language, but if it
19 suspects fraudulent activity is occurring in the card. The
20 language is irregular, unauthorized, or unlawful activities
21 may be involved. And as the facts -- and we don't believe
22 there is a breach there, because as the facts are laid out by
23 Mr. Mohamed himself, the card was frozen, he was informed of
24 the freeze. He communicated with the DUI and reauthenticated
25 his identity, confirmed, in fact, he was the right person, and

1 the card was unfrozen.

2 And so, you know, the -- and there is no contention other
3 than -- based on any facts anyway that the freeze, you know,
4 was out of line with what the contract permitted the bank to
5 do.

6 And then the last issue that the contract issue and this
7 is the account agreement contract issue, the last issue that
8 was raised was funds availability. The bank receives money
9 from the state and makes those funds available. And the
10 contention is that the bank had not made the funds available
11 because it froze the account. I'm not quite sure that's an
12 account agreement claim, as opposed to a third-party
13 beneficiary claim. But in any event, you know, in their
14 opposition, the Plaintiff said that they just don't know
15 whether what the bank did breached the funds availability
16 factually and they wanted discovery. And we, again, don't
17 think that's the proper role of discovery.

18 **THE COURT:** Let me go back for a second to the
19 aspect of the contract claim focus on the fact that the
20 account was frozen. So the breach of contract requires you
21 got to show the contract, you got to show the breach.
22 Hypothetically, if there were some breach on that aspect of
23 it, that the account was wrongfully frozen in some way or in
24 violation of the contract, what, if any damages do you
25 understand to be at issue or what position would you take

1 regarding damages?

2 **MR. HEFFERON:** At a minimum, the damages would have
3 to be those made damages traceable to the freeze, which would
4 require the Plaintiff to allege for that one-month window what
5 consequences arose due solely to the freeze and having been
6 deprived of access to whatever funds were on that account at
7 that time.

8 If there were no funds on that account at that time or a
9 small amount, obviously, that would be quite different than if
10 there were a large amount on the account, presumably.

11 But if the breach froze an account that Mr. Mohamed
12 wasn't using or that had a zero balance, then our position
13 would be there would be no damages and therefore no cause of
14 action. And the allegations certainly are not specific enough
15 to be that precise, and onto damages and even though
16 Mr. Mohamed, as he alleges, knows the exact window in time
17 that we're talking about.

18 **THE COURT:** Okay.

19 **MR. HEFFERON:** So, Your Honor, that's how -- that,
20 sort of, again what we saw as the central claim, and related
21 to that is, of course, Regulation E, which is the Count 1,
22 because there is a lot of overlap. The allegation in both,
23 that animates both accounts is that you didn't properly assess
24 my claim and pay the \$14,000. And we admit that if Regulation
25 E applies, and if he proves that the bank did not properly

1 assess and pay the claim timely, then there would be, at
2 least, a statutory penalty violation in play for EFTA. That
3 is for Regulation E. That is mootness of having ultimately
4 paid cures the contract claim, but if Regulation E applies, we
5 can see it doesn't cure the statutory claim, assuming all of
6 the elements are met, because there is a statutory damage
7 provision there, right.

8 But as we walk the Court through in the complaint, that's
9 going to be in the motion, we believe Regulation E does not
10 apply to the unique -- or the unusual circumstances we have
11 here. And the circumstances primarily came up because
12 Mr. Mohamed, we believe, and the Plaintiffs don't contest, was
13 a recipient of pandemic unemployment assistance, which was, as
14 Your Honor is probably familiar, a unique program that
15 Congress put in by the CARES Act of late March of 2020, which
16 for the first time provided federal federally-financed
17 unemployment benefits to someone who was not an employee,
18 included an owner of a business like Mr. Mohamed, gig workers,
19 people who were independent contractors, Uber drivers and the
20 like.

21 **THE COURT:** Let me ask you, and obviously we'll hear
22 from Plaintiff's counsel, but there was a suggestion in the
23 Plaintiff's opposition that Mr. Mohamed might have received
24 regular unemployment benefits, but he was trying to verify
25 that or something with the Department of Labor.

1 Have you, Mr. Hefferon, heard anything to show that these
2 were regular unemployment -- I'm just saying regular, but
3 regular unemployment benefits.

4 **MR. HEFFERON:** That's actually what people call it,
5 Your Honor, so...

6 **THE COURT:** Okay.

7 **MR. HEFFERON:** No, we don't have any indication that
8 he did. And from his factual allegations, as we pointed out
9 under the Maryland statute, he would, in fact, not be
10 eligible.

11 **THE COURT:** If they were regular unemployment
12 benefits in that case, you would think that EFTA Regulation E
13 does apply.

14 **MR. HEFFERON:** I would have to go back and correct
15 the books probably a little bit, Your Honor, on that, but I
16 think that -- I believe the answer and I'll -- subject to
17 check, I guesses, I believe the answer is, yes. But because
18 the CARES Act was a disaster relief payment, and it was loaded
19 onto a card for Mr. Mohamed, it falls within the exception to
20 the definition of what is a covered account for purposes of
21 Regulation E.

22 **THE COURT:** Right. And your position is it does not
23 qualify as a government benefit account?

24 **MR. HEFFERON:** Yes, Your Honor because the account
25 was not established by the government. In the definition of

1 government benefits for the account, which is contained in
2 Regulation E, 12 CFR §1005.15 a2 says, a government benefit
3 account means an account, quote, established by a government
4 agency. And the account was not established by a government
5 agency.

6 **THE COURT:** Okay.

7 **MR. HEFFERON:** And, I mean, at one level, Your
8 Honor, it's sort of one of the things that are the Plaintiffs
9 pointed out I wanted to respond to, sort of, generally to.
10 They point out that there was another program that FEMA ran
11 for disaster unemployment.

12 They point out that, you know, disasters are typically
13 short-term events. And the only observation, I think, that's
14 very important to keep in mind is Congress, when it decided to
15 enact the CARES Act and decided to create this new program,
16 did not decide to append it to the FEMA run pandemic, it's
17 going to be disaster unemployment program, they just created a
18 new program.

19 And so therefore, you know, the congressional choice to
20 do that separately, you know, doesn't -- you know, it means
21 that whatever you can say about the disaster unemployment
22 assistance program that previously existed, that that's
23 irrelevant in our view. Furthermore, it's irrelevant that
24 many, most in some ways gladly disasters are short-term
25 events. This one happened to be long, but it must say that in

1 March of 2020 when PUA was invented, there were, most of us,
2 all of us, hoping it was going to be quite a short event.
3 Benefit of hindsight, it obviously was not, is not. But, you
4 know, again, there is no distinction there between long-term
5 short-term, it's a straightforward application of a
6 definition. And again, we walked the Court through it and
7 believed that that's why PUA, loaded by itself onto a debit
8 card in this circumstance is not covered by Regulation E

9 Now, again, many of the protections of Regulation E are
10 provided through the account agreement. And so in a sense,
11 the two claims are, sort of, parallel as I indicated. And
12 Mr. Mohamed has been made whole and received his \$14,400. So
13 in that sense, you know, although Regulation E does not apply,
14 he received, you know, many of the benefits, at least, that he
15 is claiming under Regulation E.

16 **THE COURT:** What about the argument, again,
17 Plaintiffs wanting to distinguish this from qualified disaster
18 payments, that it appears to have been treated similarly to
19 regular unemployment benefits, at least in the sense of being
20 subject to taxation by the internal revenue service.

21 **MR. HEFFERON:** Again, the decision as to whether
22 to -- whether to tax these benefits or not is different from
23 what matters under the definition of account. Under the
24 definition of account, the question is whether it's a
25 qualified disaster payment, and it was a qualified disaster

1 payment. And whether Congress, you know, deliberately or in
2 the rush didn't think about what to do about taxability of
3 these particular benefits. The question here is whether they
4 fall within the within this regulatory definition, and they
5 clearly are disaster benefits. The president declared the
6 disaster on March 10th. He declared the disaster for Maryland
7 on March 25th of 2020, and so the payments made under the
8 CARES Act qualify and whether they're taxable and not taxable,
9 we, again, think is not relevant because it's not a
10 distinguishing factor under the regulation.

11 And it would not be, you know, surprising that it was
12 thought of and determined that PUA was going to be quite a
13 significant benefit and was, in many instances, going to
14 people who, you know, owned their own businesses or, you know,
15 were independent contractors and perhaps their -- the thought
16 was that taxability was important to preserve. It's hard to
17 know. There is, of course, nothing in the congressional
18 records to tell you those kinds of things.

19 **THE COURT:** Okay.

20 **MR. HEFFERON:** So, Your Honor, the -- I think the
21 two claims that, beyond those, that I wanted to focus on, at
22 least briefly, was the third-party beneficiary claim, and the
23 tort claim.

24 **THE COURT:** Okay. I think there is a Maryland
25 public information section.

1 **MR. HEFFERON:** There is. There is. I do want to
2 mention that as well as the Maryland Consumer Protection Act
3 claim. But let me turn to the third-party beneficiary claim.
4 And that's a claim as Your Honor knows, that asserts that
5 Mr. Mohamed can bring a lawsuit as a third-party beneficiary
6 as a contract with the state.

7 And the -- again, first, I would point out and we --
8 that the Court does not have that contract before it. And so
9 therefore, to the extent Plaintiff even would have some
10 standing to bring such a claim, they haven't stated it because
11 they can't point to the terms of the contract. They don't,
12 you know, have it and haven't given it to the Court. But we
13 think the Count 5 -- we think Count 5 dies before we get to
14 that point because there is no plausible theory we believe in
15 which an intent can be found that the state of Maryland and
16 Bank of America intended that every unemployment recipient who
17 received a debit card, would have the right to enforce that
18 state contract.

19 It's a very exacting standard, and the -- essentially as
20 the case is, we cite a number of them, Jaffee, William
21 Burnett. But the idea is, that in order to support
22 third-party beneficiary status for purposes of bringing a
23 case, the Plaintiff has to show an intent that the promises
24 being made in that contract were actually being made to the
25 third party and both parties agreed the third party could --

1 intended that the third party could sue to enforce them. You
2 need to show both, and we contend neither had shown.

3 There is nothing here that they pointed to that shows an
4 intent to make any promises to the third party.

5 **THE COURT:** Let me just back up a little bit because
6 I might have misunderstood some -- let me see.

7 You said the contract is not in front of the Court, the
8 contract being the bank --

9 **MR. HEFFERON:** Yes, Your Honor. The account
10 agreement which is the contract is exhibit -- the second
11 exhibit to the complaint, but the state bank contract is not
12 before the Court.

13 **THE COURT:** So Exhibit 1 contract?

14 **MR. HEFFERON:** Exhibit 1, that's correct, Your
15 Honor.

16 Exhibit 1 is the form of contract. You'll notice it's
17 blank, not signed. The form of contract was included in the
18 RFP when the RFP was issued. And the -- as you see from the
19 Article 1.1, Article 1, Section 1.1. It states that the
20 contract shall be this form, plus the RFP, plus the RFP
21 responses, plus ancillary agreements. And, of course, we also
22 talked about plus amendments.

23 And what the Plaintiff has submitted is the blank form
24 of the base contract. Has not submitted the RFP, though the
25 Plaintiff has talked about it in the opposition, and has not

1 submitted the RFP response. And so if the Plaintiff had the
2 ability to sue as a third-party beneficiary of the contract,
3 then in order to show a breach, the Plaintiff would have to
4 explain what the term of the contract is, but would have to
5 show the Court, and hasn't at this point, because it only put
6 before the Court the blank form of the base contract.

7 **THE COURT:** Let's assume that they had those other
8 documents, you still are making your argument?

9 **MR. HEFFERON:** Absolutely, Your Honor. There is no
10 basis for third-party beneficiary. Again, the standard
11 requires the Plaintiff to show that Bank of America and the
12 state of Maryland intended that promises in that contract were
13 being made to him or to beneficiaries, cardholders. And that
14 they intended that cardholders could sue to enforce that state
15 contract.

16 The purpose of the state contract, of course, was to
17 enable the State of Maryland to deliver benefits, to use this
18 as a mechanism. It wasn't to determine how benefits were
19 awarded, and it wasn't to determine the contractual agreement
20 with -- once the card was issued that, of course, the latter
21 was governed by the account agreement, which is attached.

22 The last point, again, I think it's important to keep in
23 mind is that the cases say this, the third party who is trying
24 to sue as a third-party beneficiary, has to be the primary
25 party in interest. And we think that's impossible to meet in

1 the case of a government contract.

2 Courts are extremely reluctant as well, to ensure a
3 third-party beneficiary when you're talking about a government
4 contract. Government contracts are inherently, there is some
5 kind of public policy there, whether it be a zoning board that
6 needs to enforce its own laws for the public good, or in this
7 case, the state of Maryland, which needs to make sure that
8 their distribution of benefits works so that the state, you
9 know -- the state generally benefits and public welfare
10 generally benefits by a free flow of unemployment benefits
11 being paid.

12 The last -- the other point I'd make is what the
13 Plaintiffs are arguing their opposition is that there were
14 provisions in the contract, the state contract which benefited
15 them, and they point to a couple.

16 One provision that talked about security, card security,
17 information security. Another was customer service, number of
18 hours, you know, when you're open, things like that. That's
19 not the test for third-party beneficiary, because if that was
20 the test, then anybody who wanted to bring a third-party
21 beneficiary claim would be able to say, well, this
22 subparagraph benefits me, so therefore, I can bring it.

23 The test is whether the parties to the original contract
24 thought the whole contract constituted a promise to the third
25 party, and that's not the case here.

1 The separate point I wanted to make about negligence is
2 something that, again, is sort of those relatively well
3 spelled out in the case law. The assertion is made that the
4 bank owed a tort duty to Mr. Mohamed to, among other things,
5 protect his financial records and not allow unauthorized
6 transactions.

7 As Your Honor knows, and I saw the Ensor versus Wells
8 Fargo case that Your Honor had in February of this year,
9 courts have been, I think the phrasing is, exceedingly
10 reluctant to add tort claims in a contract. In the Jacques
11 case, spelled out, J-a-c-q-u-e-s, spelled out the standard
12 which is, there needs to be both a contract and something
13 more. Some sort of additional circumstances showing an intent
14 of the parties to do more, have a different relationship than
15 just the contract. The only other allegation here of what the
16 something more is, is that the Plaintiff, Mr. Mohamed and
17 others, who received debit cards, were necessitous. And
18 surely that's the case, we're not contesting that. Obviously,
19 it's an unemployment program, but that doesn't provide
20 something more, some special circumstances.

21 Again, if that were the case, then Ensor and lots of
22 other mortgage modification cases would come out different,
23 too. Because those mortgage -- modification cases, and there
24 is a number of them here in this district that show no tort
25 duty to be inferred, are situations where the person is

1 necessitous.

2 So we don't think there is really any support for the
3 idea that there is a negligent claim, because all that's being
4 alleged is that there is a contractual relationship.

5 Furthermore, there is no plausible theory that even if
6 there was a claim, a tort duty to protect financial records or
7 protect the debit cardholder, there is no causation alleged.
8 The allegation here, Your Honor, is that Mr. Mohamed applied
9 for the card -- excuse me, applied for benefits, chose the
10 card, and Bank of America mailed the card to him, to his
11 residential address, and it didn't arrive or apparently was
12 stolen, either from the box or from somebody who had access to
13 the mail because somebody used it. It was used during that
14 period of time. And Mr. Mohamed says it wasn't him, and as
15 soon as Mr. Mohamed called Bank of America, they shut that
16 card down and sent him a new one to that address and sure
17 enough it got there. They overnighted it actually and it got
18 there the next day.

19 So to the extent that Mr. Mohamed suffered damages, it
20 was like those cases where the allegation of negligence
21 suffers from a break in the chain that they --

22 **THE COURT:** Well, doesn't it come to -- you want to
23 talk more about your understanding of the difference between
24 the chip technology and the magnetic stripe technology? I
25 mean, I think we don't exactly know what happened to the card.

1 It is certainly a reasonable inference that it may have been
2 taken from the mail. Somebody got their hands on the card.
3 There were transactions, as I recall, from Maryland to
4 California. Is it not correct that the magnetic stripe card
5 was more susceptible to that sort of misuse than the chip card
6 would have been, or are you saying it doesn't matter what was
7 in the mail, either card, whether it's the magnetic stripe or
8 the chip, could just as easily have been misused?

9 **MR. HEFFERON:** It's the latter, Your Honor. And I
10 think -- I mean, there is the burden of proof -- a burden of
11 pleading issue here as well, let's start there.

12 The Plaintiff alleges that a magnetic stripe card is
13 inadequate as compared to a chip card because a magnetic
14 stripe card can be skimmed. And so that if you use it, for
15 example, in the ATM, somebody can pick up the PIN you're
16 entering and, therefore, you know, then create a new card with
17 the same account number, and having skimmed your PIN, go off
18 and, you know, sort of use this cloned card.

19 There is no allegation that the magnetic stripe card is
20 less secure than a chip card when you're talking about someone
21 who intercepts the mail and is an imposter at that point. The
22 information -- excuse me, the card is delivered to a location
23 and the person grabs it, and to everyone in the world, other
24 than Mr. Mohamed, they think Mr. Mohamed has the card.

25 You know, he's -- you know, he goes and he uses it and

1 it's accepted. And, you know, Mr. Mohamed hasn't established
2 a PIN, because Mr. Mohamed never got the card. And so the
3 risk of skimming, that's the only allegation that's made as to
4 what is problematic about these cards, the risk of skimming
5 wouldn't arise.

6 Now, if Mr. Mohamed wants to allege facts, why it was
7 inadequate for the bank to send a magnetic stripe card because
8 if it gets lost in the -- you know, lost in the mailbox, that
9 that was less secure then he could attempt to allege that --
10 he hasn't alleged that. His concern about chips really has to
11 do with situations where the individual in this case,
12 Mr. Mohamed it would be, but it's not the facts where the
13 individual obtains the card and uses the card in the ATM, then
14 it gets skimmed. That would be the only factual situation
15 that would put him in a place where he could argue if there
16 was a tort duty, or he could argue that there was causation.

17 And so in our primary argument on this count, which is
18 Count 6, I guess.

19 **THE COURT:** Uh-huh.

20 **MR. HEFFERON:** Our primary argument is that there is
21 no duty, and we think that is very compelling in light of the
22 cases. But the causation argument, we just point out as well.

23 I'll touch on the Consumer Protection Act claim and then
24 talk about the Privacy claim if, Your Honor, would indulge me
25 to do it that way?

1 **THE COURT:** Sure.

2 **MR. HEFFERON:** The Consumer Protection Act claim is
3 Count 3. And there is an overlap with security, but their
4 first claim is that there were misrepresentations made about
5 the product, which I assume was just the card. And in the
6 complaint, their allegation is that Bank of America made a
7 misrepresentation that the card was private and secure, and it
8 wasn't because it had no chip.

9 There is no allegation made that Bank of America
10 actually said anything to Mr. Mohamed about that, and that
11 makes sense, of course, because DUI is talking to Mr. Mohamed,
12 not Bank of America, about the card.

13 So there is no allegation of that affirmative
14 misrepresentation. And so there is a discussion about
15 affirmative misrepresentations in the opposition that arises
16 out of the contact between Mr. Mohamed and Bank of America in
17 connection with the claim, the back and forth about the
18 various letters as Your Honor knows and recalls.

19 **THE COURT:** Yes.

20 **MR. HEFFERON:** That's not in the complaint. That's
21 not an allegation in which the CPA claims rests. And it's not
22 surprising, of course, because that is a consumer class
23 action, and that would never be certifiable. But in any
24 event, that's not in the complaint. And so we have some
25 responses to the assertion, but regarding whether those things

1 were misrepresentations, but it's beyond the scope of the
2 complaint which really talked about affirmative
3 representations.

4 Also beyond the scope of the complaint is the assertion
5 made in the opposition that there was an omission. The bank
6 omitted to tell Mr. Mohamed that the card was unsafe and
7 insecure.

8 Again, not pled in the complaint. And in any event,
9 there is no causation that was alleged in the complaint that
10 would support a claim for an omission, because there is no
11 contact alleged between Bank of America and Mr. Mohamed until
12 after he already chose the card and has the card.

13 So if the bank -- in order to show causation for an
14 omission, one has to show, as Your Honor knows, that it's
15 likely the person would have made a different choice had they
16 known the information omitted.

17 Again, outside of the scope of the complaint because the
18 omission is not alleged, but there is no allegation that the
19 Plaintiff would have done something differently because by the
20 time he did talk to Bank of America, he already had signed up
21 for the debit card.

22 And he -- and so -- and of course, it is also the issue
23 that we raised in our MPA discussion. There are no damages
24 that are caused by, again, the omission of insecurity because
25 the card was stolen, not misused. And then, of course, there

1 is an aspect of the CPA claim that overlaps the Personal
2 Information Protection Act claim.

3 And partly because factually they are arguing the same
4 thing. One is an unfair deceptive practice and one is a
5 violation of PIPA. And also a violation of PIPA is
6 enforceable as an unfair practice.

7 **THE COURT:** Right.

8 **MR. HEFFERON:** Under the MCPA. That's going to be
9 under the CPA. The allegation -- there are two claims under
10 the PIPA count, which is Count 2, factual claims. One has to
11 do with the use of magnetic stripes and not EMV chips. The
12 second is the bank violated the act by collecting, storing,
13 and transmitting information in an insecure manner. I'll talk
14 about that one first.

15 As we noted, that's an allegation made on information and
16 belief. There is no assertion of fact that would support the
17 claim. The best they do is the quotation paragraph 59A of an
18 unnamed Facebook post, a post by an unnamed person. And so
19 there is really no basis for any recovery under the PIPA for
20 collecting, storing, and transmitting information, the general
21 comment.

22 So really, what it comes down to is the allegation that
23 the bank violated the PIPA by using magnetic stripes on the
24 cards and not EMV chips.

25 And again, I mean, this is essentially a, per se

1 allegation. A per se using magnetic strips is a violation of
2 the act, because it is insecure. And there is no -- there is
3 no support for that, there is no regulatory or other, you know
4 statute or any kind of order requirement that cards be used
5 with chips only, and not magnetic strips.

6 The timing the Plaintiffs allege while the bank uses
7 chips in other cards, but they date that to a period after the
8 Maryland contract already started. And Maryland did not
9 specify that chips be included with the cards. And in any
10 event, even if the PIPA claim could survive based upon
11 potential risk, again, there is no causation.

12 In order to have a PIPA claim, because it's enforceable
13 through the Consumer Protection Act, Mr. Mohamed would have to
14 show that the use of a magnetic stripe card, rather than a
15 chip card caused him injury. And if the card was stolen, and
16 all he alleges is skimming is the risk that was introduced, he
17 can't show that the use of the card -- excuse me, the issuance
18 of the card with that technology was an actionable violation.

19 **THE COURT:** Okay.

20 **MR. HEFFERON:** Okay. If there is nothing else, Your
21 Honor, I think I'll step back.

22 **THE COURT:** That's absolutely fine for now.
23 Obviously, I'll hear from Mr. Murphy and let me just say we're
24 fine. I may have to interrupt for a brief conference call at
25 4 o'clock if you're still talking.

1 **MR. MURPHY:** Yes, Your Honor.

2 **THE COURT:** But that's fine, I'm happy to hear from
3 --

4 **MR. MURPHY:** May it please the Court, Judge, may I
5 sit down because I've got my laptop here?

6 **THE COURT:** You may. That's absolutely fine.

7 **MR. MURPHY:** Again, I appreciate the Court's
8 understanding of my travel. I didn't get a ticket, though.

9 Judge, Mr. Hefferon's account of -- he gave a very
10 detailed account, I guess, a backdrop of everything. And I
11 don't really have an issue of much of what he said, but there
12 are some things that probably need to be brought to the
13 forefront. And I wrote down that he discussed that the
14 benefits, there was a choice, between a paper check and the
15 Bank of America debit card. Not really a choice for the
16 unbanked.

17 The unbanked being people like my client who don't
18 otherwise have access to banking facilities and the government
19 decided to partner up and contract with Bank of America with
20 the purpose of distributing public funds, and it's important
21 because for people who, of lower income folks, they don't have
22 access to banks. So the choice was not one that my client
23 Mr. Mohamed and other people may have had a choice and it
24 wasn't really a choice. I think the facts later on may
25 develop that we'll learn more about the choices that were

1 presented to Mr. Mohamed and other people similarly situated.
2 That was my only real comment about that.

3 There was another comment, and I wrote it down because I
4 don't want it to be glossed over.

5 **THE COURT:** Let me just interrupt for a second then.
6 If he didn't have a choice, how does that interact with
7 your --

8 **MR. MURPHY:** Contract claim?

9 **THE COURT:** -- reliance on --

10 **MR. MURPHY:** Oh, Judge, it's present there and I
11 know it. And this is one of these cases that I think one of
12 the reasons why the Court in California and perhaps, Your
13 Honor, I don't want to put myself into your position, is
14 struggling with this is that there is a sense that there is a
15 harm to both Mr. Mohamed and the other people similarly
16 situated by the facts that are presented in the complaint.
17 And in this case, and I value an opportunity to have oral
18 argument in any case in Federal Court, because it's an
19 opportunity for me to look at the Court and tell the Court
20 what our views are. And also counsel, they did an excellent
21 job in the brief. When I read the brief, I felt like I was --
22 I felt like myself and my co-counsel, Kat Highland just really
23 missed the boat, and -- but we didn't. And I'll explain why,
24 because everything hinges on the Electronic Funds Transfer
25 Act. But I got interrupted -- Judge you --

1 **THE COURT:** You had another point.

2 **MR. MURPHY:** It was a great point and the great
3 point was this, is that several years ago the banks got
4 together and they realized that they wanted to limit exposure
5 for unauthorized electronic funds transfers. And, you know,
6 counsel uses the EMV. The EMV liability shift occurred
7 several years ago, so that any merchant taking a card that
8 just has a mag strip is liable if it's unauthorized use. And
9 this is not just the mag strip, it's the information that's
10 contained if you've got the -- if you got a chip. And it's
11 also verification, validation, calling in to activate it, the
12 PIN number, all of this goes into protecting the person whose
13 money is in that stored value card.

14 And, you know, I've done other unauthorized Electronic
15 Funds Transfer Act cases, one in particular involving public
16 funds for veterans, specifically Vietnam veterans that got
17 money that didn't get money on their cards.

18 So this is important. And so Judge, I want to get right
19 to the thing that is bringing us to this Court, and we weren't
20 here under CAFA for the Class Action Fairness Act. We're here
21 because we had a federal claim and the federal claim is under
22 Electronic Funds Transfer Act. And I can summarize my
23 client's view on this is that, the argument of Bank of America
24 conflates the executive power to declare it of urgency, and
25 the right of Congress to enact rights to benefits because of

1 an emergency.

2 And I'm going to track the statute. I'm going to track
3 the regs. I'm going to track the staff interpretation, which
4 we're going to have Chevron deference to. And the inevitable
5 conclusion is the CARES Act benefits are separate from
6 anything that the president at that time, President Trump
7 declared. They're related both temporarily, that is at the
8 same time, we all remember that time period. And it's related
9 also in the fact that there was a definite need to get
10 benefits to people and rapidly.

11 And counsel said something to the effect, and I'm going
12 to paraphrase Mr. Hefferon. I believe what he said was that
13 they've rushed to do the Act, and they didn't address the tax
14 consequences.

15 We don't have -- the Court doesn't have the role of
16 making interpretations, except what the statute says, and the
17 statute is clear we don't go beyond that. And I think the
18 statute when we go through it together, we're going to see
19 that the statute supports Electronic Funds Transfer Act claim.
20 And Judge, I'm going to sit down now.

21 **THE COURT:** Sure.

22 **MR. MURPHY:** So we start off with the definitions
23 that are contained in the regs. That's 12 CFR §1005.2. And I
24 apologize to the court reporter that I sometimes get excited
25 and I speak quickly. I'm going to ask my co-counsel to kick

1 me if I go too quickly.

2 So there is a carve-out, and this is something that
3 we're here today on this. Is this carve-out for disaster --
4 qualified disaster relief payments, kick Mr. Mohamed and the
5 class out of the federal claim?

6 The definition is an account that is directly or
7 indirectly established through a third party and loaded with
8 qualified disaster relief payments. And everything in -- has
9 a definition and an interpretation.

10 The official interpretations or Reg E, and we'll get a
11 Chevron deference to this, is that -- and it's under
12 Paragraph 2b3ii.

13 **THE COURT:** Okay. I hate to be lost already, but
14 where -- I've got the Reg 105.6 and -- no, wait a minute.
15 Okay. 1005.2, are we still there?

16 **MR. MURPHY:** Yes, ma'am. We're under 2B account and
17 it's --

18 **THE COURT:** Okay. Fine.

19 **MR. MURPHY:** And it's giving us guidance on the
20 definition of the count.

21 **THE COURT:** All right.

22 **MR. MURPHY:** And it says under subsection --
23 paragraph 2B3ii2. Excluded disaster relief funds for purposes
24 of Section 1005.2, Subsection B3iiB.

25 Quotation, qualified disaster relief funds means funds

1 made available through a qualified disaster relief program as
2 defined under 29 U.S.C. §139 Subsection B. And in our brief,
3 we talked about the Internal Revenue Code, and all good things
4 come out of the Internal Revenue Code, apparently.

5 We go to the Internal Revenue Code to Section 139 and the
6 subsection is B. And this is in their brief, in our brief,
7 too, but it wasn't nearly, you know -- when you go look at
8 qualified disaster relief payment defined, it has to be a
9 qualified disaster. And I just lost my place -- it says, a
10 qualified disaster relief payment defined for purposes of the
11 section, the term qualified disaster relief payment means, and
12 then any payments to the various people below.

13 However, you have to get a definition of qualified
14 disaster relief payment, and it needs to go to qualified
15 disaster and it has to be defined, and that's under Subsection
16 C. Qualified disaster relief defined. And under Subsection
17 C2, it's defined -- the term qualified disaster means, under
18 Subsection 2, a federally declared disaster as defined by
19 Section 165i5A. And that leads us to the definition under
20 26 U.S.C. §165, that's losses. And it says, a federally
21 declared disaster for purposes of the subsection means, the
22 federally declared disaster means any disaster subsequently
23 determined by the president of the United States to warrant
24 assistance by the federal government under Robert T. Stafford
25 Disaster Relief and Emergency Assistance Act.

1 So I think we're all in agreement that these are the
2 things that control the definition and the exceptions, the
3 carve-outs. However, if you look at the CARES Act, the
4 enactment of the CARES Act is not connected to the declaration
5 of the federally declared disaster by President Trump. The
6 words "federally declared disaster" are wholly missing from
7 the CARES Act. Nowhere is there a definition that -- or even
8 those words. And this was, in my view, purposeful. And I
9 don't even need to -- I'll address what I think the purpose is
10 at the end of my argument. Instead, Congress chose to use the
11 words COVID Public Health Emergency, and that's under
12 subsection -- I pulled it out of the CARES Act. And it
13 defines what the thing is that we're talking about, why there
14 is money being -- flowing to people like Mr. Mohamed and other
15 similarly situated is because of a COVID-19 public health
16 emergency, and it's defined as the term COVID-19 public health
17 emergency means a public health emergency declared by the
18 secretary of health and human services on January 27, 2022,
19 with respect to the 2019 novel Coronavirus, that is not --
20 that is not the declaration by the president. It is not
21 connected to it in any way. And I can go through the balance
22 of this. My client is a covered person under the CARES Act.

23 There was some discussion in the briefs about whether or
24 not Mr. Mohamed is to be treated the same as an employed
25 person. He's a self-employed person, and under the Act, a

1 self-employed person is treated as an employed individual.

2 The other thing in the CARES Act that shows that it
3 doesn't have to do anything with declaration is that the PUA
4 period of assistance is not tethered to the declaration. The
5 dec -- and this was purposeful, I believe, on the part of
6 Congress. And, again, I think, they just looked at the
7 statute itself. But the purpose for the CARES Act not being
8 connected to President Trump's declaration is probably very
9 political. And being that, the determination of when the PUA
10 period of assistance, it's set forth under C and it says --
11 its sentence provided for in Paragraph 2, the assistance
12 authorizes subsection B shall be available to a covered
13 individual, and it gives the time periods from beginning on or
14 after January 27, 2020. Ending on or before September 6,
15 2021.

16 And below that it says, the limitation, duration
17 assistance. And they have a termination date unconnected with
18 whatever the declaration that President Trump or whatever
19 president was in office could have made a determination there
20 is no more COVID problem. And from a -- Congress knew this,
21 and they knew this because they purposely clarified that they
22 meant to separate the CARES Act with anything the president
23 did, and that's shown in Subsection H, which is in relation
24 between pandemic unemployment assistance and disaster
25 employment assistance, and they purposely substituted words,

1 and they substituted COVID public health emergency for major
2 disaster, pandemic for disaster.

3 And this is why the Electronic Funds Transfer Act
4 carve-out that is proffered as being the thing that destroys
5 this federal claim on behalf of Mr. Mohamed and everyone
6 similarly situated, doesn't work.

7 It is very good drafting of an argument, but the
8 argument when you look at it carefully, and we must look at
9 the statute the way it's drafted. And if Congress meant to
10 tie the benefits to that declaration, it would have done so.
11 It did not. And I believe that the -- we have to read the
12 statute as it's written, and also give deference to the
13 interpretation of Reg E, and it really is not much to it.

14 On my review of the case law, there is nothing out there.
15 And I'm not even sure that this is a position being argued
16 that strenuously in the other cases. Counsel can inform the
17 Court as to it.

18 So our view on this is that Electronic Funds Transfer Act
19 applies on its very face, and that we have stated a cause of
20 action for Count 1 not subject to the carve-out. Your Honor,
21 I don't have any further argument with respect to Count 1.

22 **THE COURT:** Oh, well, all right. Let me clarify. I
23 understand or I'm beginning to understand you have a statutory
24 argument. You are not relying on an argument that this is a
25 government benefit card, or are you -- a government benefit

1 account?

2 **MR. MURPHY:** It is a government benefit account,
3 but, you know, it's Bank of America's view that they are the
4 ones that established it. It's -- I don't think it makes as
5 much a difference in determination whether the EFTA applies.
6 And, you know, look if -- I'm going to hammer this in one more
7 time. If Congress meant to do that, they would have had the
8 word "declaration" in the statute, and they didn't.

9 They made -- Congress made its own determination about an
10 emergency. There was an emergency, everyone in this room
11 knows there was an emergency, but we have to follow what the
12 -- the statute. And there were strong political forces as to
13 why they weren't going to tie it to a declaration by the
14 president.

15 And I can't get behind -- judge the legislative history,
16 I can tell you this, it was a mess. But it wasn't enough
17 where I could bring it to the Court's attention arguing
18 anything because it didn't make -- it wouldn't add anything to
19 this.

20 **THE COURT:** Okay. Go ahead, Count 1.

21 **MR. MURPHY:** That's the extent of my argument on
22 Count 1. Judge, there was so much stuff that was presented by
23 counsel, does it -- both sides, but the EFTA thing is
24 important. I don't want anything to be lost in the rebuttal.
25 Would the Court consider having the rebuttal now in my

1 argument so we can move onto the other claims?

2 If Mr. Hefferon wants to respond to anything at this
3 particular moment, he may. Otherwise, we'll...

4 **MR. HEFFERON:** Your Honor, maybe -- and I don't have
5 any problem with what counsel would suggest, but maybe it
6 actually is good for me to do it on this one in real time
7 because we're talking about sub sub subsections of various
8 provisions.

9 And so our response, and I think we address this in the
10 reply, is that what the Plaintiff's position misses, is that a
11 definition of account, that's what we're talking about is --
12 triggers on whether it is -- there are funds that are quote,
13 loaded exclusively with qualified disaster relief payments.

14 Okay. So the question -- and it points you to the same
15 section, obviously, that my brother cited, Section 139 of the
16 Internal Revenue Code which defines, qualified disaster relief
17 payments. And it's defined, and we point this out. It means,
18 any amount paid to or for the benefit of an individual, and it
19 has four possibilities. And the fourth one is, if such amount
20 is paid by a federal, state, or local government or agency or
21 instrumentality thereof in connection with a qualified
22 disaster in order to promote the general welfare.

23 So the question is then -- well, the amounts, the PUA
24 amounts, amounts that were paid by a federal or state
25 government, yes. Were they paid in connection with a

1 qualified disaster? Yes. And we'll come back to what's the
2 definition of that. And were they to promote the general
3 welfare? Clearly, yes.

4 To go back to the qualified disaster, which is the third
5 element of this is, well, jeez, is qualified disaster defined?
6 Yes, indeed it is, immediately below, Section 139C a qualified
7 disaster is defined to mean, among other things, a Federally
8 declared disaster as defined by Section 165, which runs you to
9 a Section 165, which tells you that among the things that
10 qualified as a disaster is any disaster subsequently
11 determined by the president to warrant assistance by the
12 federal government under the Stafford Disaster Relief Act.

13 So we think that it, therefore, means that since these
14 funds were paid by a federal government in connection with a
15 qualified disaster to promote the general welfare, and
16 therefore, it qualifies as a qualified disaster relief payment
17 and that triggers the exception of the statute.

18 **THE COURT:** I think I hear Mr. Murphy saying that
19 this is not a disaster determined by the president, that it's
20 independently a public health emergency determined -- as
21 determined by Congress.

22 **MR. MURPHY:** Yes, Your Honor.

23 **MR. HEFFERON:** Yes, Your Honor. The problem with
24 that, Your Honor, is that definition of qualified disaster,
25 which is in the code, refers you to the presidential

1 declaration. And so that's the problem with the argument.
2 And there is no question that this was a presidential
3 declaration, a disaster as determined by the president and,
4 therefore, is a qualified disaster. And no question that
5 there was money appropriated and paid onto cards to promote
6 the general welfare in connection with that disaster.

7 So I see at some level, perhaps, the theoretical issue
8 that's being raised here. But the problem is, the definition
9 do, in fact, trigger off the presidential declaration. And so
10 the -- whether the CARES Act said, we're appropriating this
11 money because of the presidential declaration or because of
12 the DHS declaration or some other declaration, the health
13 emergency declaration, the fact of the matter is that the
14 definition that tells us whether Reg E applies says, as long
15 as it's tied to a presidential declaration, that triggers the
16 exception.

17 And as long as it's money, it doesn't say money
18 appropriated to -- you know, because of that iteration. It
19 just says it's any money paid by a federal agency or state
20 agency in connection with the disaster to promote the general
21 welfare.

22 **THE COURT:** But isn't theoretically the argument
23 then, if it doesn't trigger the exclusion, because it doesn't
24 meet this definition, then it is a prepaid account then it's
25 not excluded, and it's covered under Regulation E?

1 **MR. HEFFERON:** Which is -- and our argument is it
2 does, because as you walk through each of these it triggers
3 back to ultimately to the Stafford Act declaration by the
4 president.

5 And so therefore it is within the definition of -- within
6 the exclusion, because clearly the money is paid by the
7 government for the general welfare. And it's in connection
8 with a qualified disaster and it was declared by the
9 president.

10 **THE COURT:** What does the -- I'm very glad we're
11 having this discussion because I'm not -- so the CARES Act,
12 what does the CARES Act rely on as its authority?

13 What did Congress say we're relying on to make these
14 benefits available?

15 **MR. HEFFERON:** They created a new provision of the
16 CARES Act -- I mean, of the statutes, the United States
17 statute that says that, you know, we are going to appropriate,
18 you know, \$300 million to pay people --

19 **THE COURT:** Right.

20 **MR. HEFFERON:** -- unemployment even though they, you
21 know, are self-employed or a gig worker and the like. So, I
22 mean they're exercising their authority as the legislature to
23 appropriate money, and then they are directing it to -- you
24 know, to the Department of Labor, Federal Department of Labor
25 to distribute it to the states which then did.

1 **MR. MURPHY:** May I offer just a surrebuttal on that
2 just a tiny bit?

3 **THE COURT:** Yes.

4 **MR. MURPHY:** And it was in our brief and my
5 co-counsel gave me a note, and I agree with her view on this.
6 And just as an aside, I'm a Floridian, originally, moved to
7 Charlottesville, and we always got emergency relief after
8 every hurricane and tornado.

9 That pot of money is separate and discrete from the money
10 that was established by Congress from its role as the guardian
11 of the purse of this country, a totally different fund, and
12 Congress did not mention anything about the declaration, this
13 goes back to my comment about the politics.

14 It is beyond the compelling force of reason to assume
15 that Congress wanted to, basically, spend what we spent
16 tightening World War II, times five, based on a declaration by
17 the president. It's beyond force of reason. And Congress
18 meant to restrict this to what they determined to be the
19 emergency, and the views of Congress as the Court should
20 recall from just being in America at this time, is that there
21 was a view that there wasn't a problem from the executive
22 branch, a different view from the legislative branch, and the
23 extent and duration of that was determined by Congress and its
24 wisdom and its view and the duration of the CARES Act isn't
25 determined on how long the president of the United States

1 determined that the COVID problems was going to exist, it
2 would go away by the end of the spring, it did not.

3 And so that's why Congress didn't connect it in any way,
4 shape, or form to the president's declaration. Now, I'm being
5 emphatic about this as much as counsel is, and I appreciate
6 his argument, but it's not what the statute says.

7 **THE COURT:** Okay. All right. So that's your
8 Count 1 argument, and I guess we're somewhat in agreement in
9 the sense that if EFTA does apply, if the regulation does
10 apply, then there is, at least, the possibility of a statutory
11 remedy for what you're mostly complaining about in Count 1,
12 which is this whole good faith investigation, reasonable
13 basis.

14 **MR. MURPHY:** Yes, Your Honor. And not rendered moot
15 by the tender of money after the filing of a lawsuit, the
16 tender of money did not make my client whole to create
17 mootness.

18 He has claims under the EFTA as well as the other class
19 members with statutory claims. And additionally, the money
20 tendered wasn't the amount of money that would compensate him
21 on a terribly -- for his loss, the financial loss.

22 Count 2, violation of Maryland Personal Information
23 Protection Act. This Court has had lots of cases under that
24 statute, because the Maryland statute is unique. Well, it was
25 unique when it was enacted, not so much anymore. And like I

1 mentioned, this is, I guess, a case for modernity. We're
2 dealing with issues related to electronic funds transfer,
3 security of information, and public benefits being distributed
4 by private companies, which was not a thing when I got out of
5 law school.

6 Judge, we allege that personal information was lost and
7 given to third parties in that card magnetic strip. And we
8 believe it included the account number, Mr. Mohamed's name,
9 his Social Security information, the amount of his benefits,
10 and possibly other things that are coming out with that
11 magnetic stripe -- strip. And that is, under the Maryland
12 Act, what personal information is.

13 They cannot say that this was the equivalent of a cash
14 or -- you know, it's not like it's a \$10 bill that was mailed,
15 although in practice it ended up being that way because of the
16 way they didn't protect it, and protect the ability for people
17 to access it, it was just like cash. And I think that's what
18 I heard. But the loss of information gives the client, my
19 client, and other similarly situated a claim. And the recent
20 case, In Re: Marriott International supports that. We
21 gave -- we posed the clarity that they used non-secure
22 magnetic stripe, and the technology was unfair and deceptive,
23 and there was a -- and based on the EMV shift liability policy
24 adopted by Bank of America against its own merchants, I think
25 that their position really is hollow.

1 We have stated a cause of action, and the case is out
2 there, and there is a -- the Maryland case cited in our
3 materials In Re: Rutter's case, Rutter's Incorporated data
4 security breach case, it touched upon the use of magnetic
5 stripes. So this is a little bit more than that, and perhaps
6 we should go back and replead this. I view this as being
7 sufficiently pled that their -- the way they handled the data
8 caused a breach of the act. You know, I --

9 **THE COURT:** If you could elaborate on that a little
10 bit more because --

11 **MR. MURPHY:** Well, I started thinking about it,
12 Judge, from preparation for both the briefing and today,
13 potentially we could have added that they didn't have
14 protections that now banks do that protect people from having
15 people pick up something from the mail. And by the way, I
16 need to bring this point out. There is -- we don't know what
17 happened to Mr. Mohamed's card. We don't know if it was
18 stolen. We don't know if someone at Bank of America took it,
19 or some vendor that they employed to send it out took it, or
20 they just took the data.

21 All we know is that he and others were harmed by it, and,
22 perhaps, we could replead it, add additional facts with
23 respect to what we believe and contend lead to the problem,
24 and that includes the theft of the verification system. I
25 mean, how would someone -- is this the equivalent of having a

1 \$20 bill mailed to someone in the mail, that's what it sounds
2 like.

3 **THE COURT:** Well, and what's the difference between
4 the magnetic stripe and the chip in that regard --

5 **MR. MURPHY:** In that regard --

6 **THE COURT:** -- what I'm hearing is you can take
7 either one of them into --

8 **MR. MURPHY:** That's correct.

9 **THE COURT:** -- your bank or your sale place, your
10 store, wherever and use it?

11 **MR. MURPHY:** Your Honor, that's true. But in both
12 instances, there would had to have been verification. Like
13 you get a credit card in the mail now from Bank of America. I
14 have one in my wallet, I pull it out. It's got the chip in
15 it, but in order for me to use it, I got to verify who I am.
16 And this goes back to the unbanked people, how do they verify
17 who they are with Bank of America?

18 **THE COURT:** They call up. I mean, there is a number
19 on the card.

20 **MR. MURPHY:** Right. And they have to have the data
21 to match it. They have to have the data to match it that my
22 client is Mr. Mohamed, what is your Social Security Number,
23 where do you live? What's your date of birth?

24 Do you call in? There is no real relationship between
25 these people. This is why this is important.

1 **THE COURT:** Well, again, we're getting way outside
2 of anything that's pled in the complaint, I suppose. But I
3 get a credit card in the mail, it has a number for me to call,
4 I call. They say, you're authorized. That's great. I mean,
5 I don't remember being asked for my Social Security Number.

6 **MR. MURPHY:** Your Honor, that's true. They
7 typically will pair that with your phone. They typically will
8 pair with your cell phone or your landline, whatever they
9 associate with you, they can identify who you are by this, and
10 that's why in instances of people who are unbanked, and they
11 also use throwaway phones. I'm very familiar with the
12 problems of the people in the lower income groups, and that's
13 why they expose Mr. Mohamed and others to harm by having this
14 data go out. And the data also included what my client is
15 owed, his money. That money is data. The amount that he is
16 -- the money on that credit card is data. And if they had
17 done the things that they needed to do to protect it, we would
18 not be here today.

19 And so our view is that we pled, and, perhaps, I need to
20 add additional facts to it, Judge, I'm not perfect. Judge,
21 with respect to Count 3, which is the American Consumer
22 Protection Act --

23 **THE COURT:** Yes.

24 **MR. MURPHY:** -- what happened here to Mr. Mohamed
25 and others similarly situated is something that our friends

1 CAFA novel in terms of being unable to actually get an answer
2 to the question about, where is my money. And then when they
3 get the answer, oh, it's not fraudulent, but they don't get
4 their money, and there is no way for them to get their money.
5 And it took a lawsuit, I think we're all in agreement, to get
6 the money. That is the basis of our claim under the Maryland
7 Consumer Protection Act.

8 **THE COURT:** Where is that alleged in the complaint?

9 **MR. MURPHY:** Oh, Judge, it's --

10 **THE COURT:** I mean, I've got Count 3. I read that
11 as essentially coming back to a representation that the card
12 was private and secure when it was not.

13 **MR. MURPHY:** Judge, in all candor, when we were
14 working on the response to, we considered filing an amended
15 complaint, and we did not. Our view is that we needed to
16 address the federal claim and get it done with, because we
17 would not be in this federal court without that federal claim.

18 Judge, it may be necessary for us to replead it, if we
19 can and --

20 **THE COURT:** Okay.

21 **MR. MURPHY:** Judge, the breach of contract claims,
22 counsel provided a very good argument with respect to Count 4,
23 the two counts that are separate. One is direct contract
24 under the cardholder agreement, and the second is under the
25 contract with the state. Our view is that under a breach of

1 contract claim, I think, most of the argument is that our
2 claim is moot because they gave us some money.

3 To the extent that that is their argument, our view is
4 that it is not moot because they didn't pay the full amount of
5 what he's owed, they tendered what they considered to be what
6 he is owed. And secondly, we're connecting, obviously, the
7 Electronic Funds Transfer Act claim, by virtue of the fact
8 that the contract talked about that they were going to comply
9 with the reg, and they did not.

10 And with respect to the breach of contract claim --

11 **THE COURT:** Before you leave Count 4, what is the
12 source of your argument that he would be entitled to more than
13 the full amount of benefits that was on the card?

14 **MR. MURPHY:** Well, Judge, in all candor, it relates
15 to the consequential damages and the view that he's entitled
16 to money for not having the ability to pay his rent, to pay
17 things like his car payment, to pay for his children's food.
18 And I am -- I see your face, Judge, and I -- I don't want to
19 be the spear catcher in this one, but in all candor if their
20 argument that those are consequential damages don't flow from
21 breach of contract claim, they have a valid point, perhaps.

22 I don't want to use my currency on claims I don't feel
23 that strongly about, Judge.

24 **THE COURT:** Okay.

25 **MR. MURPHY:** I think from the hearing yesterday, I

1 try to be as transparent as glass. Our view of this case, is
2 it's going to be, if it goes forward as a class action, it's
3 going to go forward on the statutory claims, perhaps under the
4 negligence claim, Judge. And the negligence claim is that
5 there is a duty to protect people's loss of money. And at the
6 pleading stage, I think we stated a cause of action on behalf
7 of the class members.

8 I did want to just go back to the third-party
9 beneficiary. I jumped ahead there. And I wrote down what
10 counsel said, that there are no cases that deal with the
11 ability for a person receiving public benefits or benefits
12 from the government, to rely upon the contract between the
13 government entity and the business. And there is not much
14 there, and the reason is, is that this entry of businesses
15 into handing out money and holding money and distributing
16 money into as recent as the last two decades, and they
17 outsource it to businesses, and these businesses, in this
18 case, Bank of America, didn't do a very good job on it.

19 And our view is that we -- our client, and those like
20 him, were the beneficiaries of this contract because they did
21 talk about what they were to be expecting in terms of the
22 guaranteed multilingual toll free customer services from their
23 own contract. And the account freeze practices.

24 Counsel made an issue that we don't have the contract
25 attached to the complaint, well, that's true, that was the

1 best we could get. But my view is that the public was
2 supposed to be the beneficiary of the contract, and they
3 didn't get the benefit of the contract.

4 Judge, I don't really have a lot more argument. The
5 common law claims, in all candor, are there because there will
6 not be relief to the class. There won't be relief to
7 Mr. Mohamed to make him whole, if his Electronic Funds
8 Transfer Act fails. And there has to be a remedy. The courts
9 were made to give remedies to persons like Mr. Mohamed and
10 others similarly situated. And our view is that that's under
11 the statutory claims, and this -- these additional claims are
12 to, kind of, emphasize how the common law didn't protect
13 people.

14 And Judge, that's the extent of my argument. And counsel
15 did an excellent job with presenting the bank's case, but I
16 think that the EFTA claim is strong and should survive this
17 motion.

18 **THE COURT:** Okay. I appreciate it, I certainly
19 agree that it seems, kind of, fundamental the first thing to
20 decide is this EFTA and whether the Regulation E applies or
21 does not. And then we may or may not get to an issue of
22 pleading, repleading and some counts surviving and some counts
23 not, but the statutory interpretation in Count 1 certainly
24 seems fundamental.

25 Mr. Hefferon?

1 **MR. HEFFERON:** Your Honor, if I may. We certainly
2 agree that's an important claim, and all of them are
3 important. I would make one observation -- two observations.
4 The first is, as indicated, the contract does not -- you know,
5 the contract is, sort of, in parallel with Regulation E. It
6 says, it will do these things that are, in fact, consistent
7 with Regulation E. That, of course, doesn't mean you could
8 sue under Regulation E for breach of the contract, but that
9 also means that it's not -- you know, we would definitely take
10 issue with the concept that, you know, people will not get a
11 remedy if the statutory claim does not survive because of that
12 parallel between the contract and the --

13 **THE COURT:** It's just a more limited remedy in
14 Mr. Murphy's case?

15 **MR. HEFFERON:** It's a more limited remedy, that's
16 true. I mean, undeniably, I know consequential damages is an
17 element of that and not the only element.

18 Given the fact that I responded on that count, I won't
19 say anything more. And generally, I would just -- in response
20 to my brother's comments, I just make one observation and
21 that's really -- I think you've heard plenty today and the
22 briefs, I think, on both sides are pretty well done.

23 The idea, though, I can't let go about negligence that
24 the assertion somehow is that the negligence claim might
25 survive because the bank has a duty to protect people's money.

1 And, you know, I understand -- you know, I understand that,
2 you know, reaction or that hope, but that would, obviously, do
3 quite a lot of violence to the precedence, as well as to the
4 contractual relationship between banks and depositors, or
5 banks and those who they work with in the debit card or credit
6 card relationship or whatever.

7 The contract is -- the account agreement is pretty long
8 actually, and it says what the bank will and won't do. It
9 provides certain restrictions, some of which are undeniably
10 for the protection of people like Mr. Mohamed. Like the
11 ability to freeze cards. And we all experience, and this
12 happens with debit cards as well that, you know, there is a
13 suspicious transaction, and your card gets blocked, and you
14 call up and say, okay, I just want to make sure it's you,
15 because you don't normally, you know, spend this kind of money
16 at Home Depot or, you know, in Newport News, because you --
17 every other expenditure has been within ten miles of where you
18 live.

19 So, you know, there is a lot of protection that the bank
20 has agreed to and that, you know, does benefit consumers. But
21 we would strongly urge the Court, I don't even think those are
22 the allegations, but strongly urge the Court not to find the
23 bank has some kind of generalized duty to protect money on --
24 in deposit accounts or, obviously, in this case on a debit
25 card.

1 Thank you.

2 **THE COURT:** Thank you. I guess one last question,
3 and this is down the road, if at all.

4 In terms of the class that you see your client
5 representing, are you talking about folks that got the
6 pandemic unemployment benefits?

7 Are you talking about anybody that got an unemployment --
8 including regular unemployment -- debit card from the Bank of
9 America through the state of Maryland wanting to give them
10 unemployment?

11 **MR. MURPHY:** Your Honor, --

12 **THE COURT:** You don't have to answer that if you're
13 not ready to --

14 **MR. MURPHY:** -- I actually have thought about that,
15 because my view is that once you get over this -- the
16 carve-out, the pandemic carve-out, the disaster carve-out was
17 something that we saw when they presented it to us. The way
18 we define the class is basically anyone who has had their
19 benefits taken. And I think that's the definition in the
20 complaint, and they chose to challenge it based on the
21 carve-out.

22 And this is going to be a fairly -- Judge, if the court
23 denies the motion as to the EFTA claim, this is going to be a
24 very straightforward case, not a lot of moving parts in my
25 view and experience on it. And my view is that we'll probably

1 get a fairly good size class of people who have had their
2 stored value cards, prepaid cards, whatever you want to call
3 it, taken and impaired.

4 I know I'm not very ambitious in my cases, Judge. I try
5 to view these things for what they are, and this is one where
6 I feel very strongly about the harm to the class. So I think
7 the definition in what we have in the complaint is what we're
8 going to go on now, I don't anticipate changing it, although I
9 do have new co-counsel who has stronger views on things.

10 Judge, I apologize, we were supposed to have my other
11 co-counsels here, too, they were also unable to attend, and I
12 was the closest with a car, so...

13 **THE COURT:** All right. Excuse me, well, thank you,
14 again, just in case Mr. Hefferon was wondering. You referred
15 to a hearing yesterday, that one was a conference call by
16 phone in an unrelated consumer case.

17 **MR. HEFFERON:** That didn't worry me, Your Honor.

18 **THE COURT:** No, no, no, just as a matter of
19 interest, so two arguments, so to speak, in two days.

20 **MR. MURPHY:** I have not had two hearings with the
21 same federal judge in two days in quite some time.

22 **THE COURT:** Well, thank you all. I really do
23 appreciate the time and the effort to come here and to be here
24 in person, and do let me know if the Court in California
25 decides anything in the next couple of weeks. I won't wait

1 for them.

2 **MR. MURPHY:** Thank you, Your Honor.

3 **MR. HEFFERON:** Thank you, Your Honor.

4 **THE COURT:** Thank you.

5 **THE CLERK:** All rise. Court stands adjourned.

6 (At 3:53 p.m., the hearing concluded.)

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